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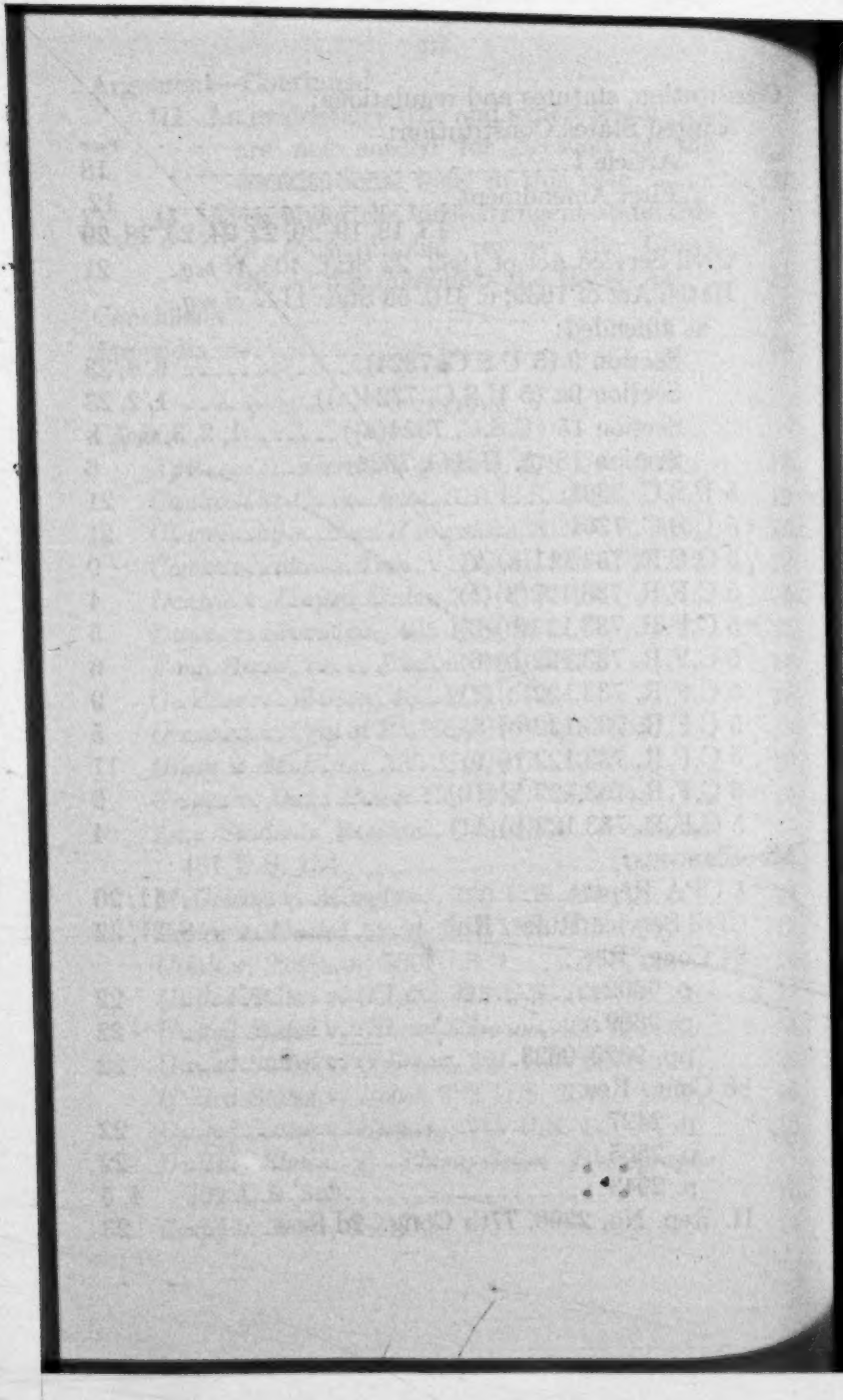

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-634

UNITED STATES CIVIL SERVICE COMMISSION, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

I. APPELLEES HAVE FAILED TO DEMONSTRATE THAT THE HATCH ACT IS VAGUE IN ANY SIGNIFICANT RESPECTS WARRANTING ITS FACIAL INVALIDATION

The discussion in both the district court's opinion and the appellees' brief of the alleged vagueness of the prohibition in Section 9(a) of the Hatch Act is written as though there were no statute at all, but merely some vague, ethereal ban on "politics." They appear at times to have lost sight completely of the specific language of the prohibition and of its definition in Section 15, which designate what Congress in fact prohibited. Section 9(a) states that "An employee in an

Executive agency * * * may not * * * take an active part in political *management* or in political *campaigns"* (emphasis supplied). Section 15, in defining the proscription, similarly refers to "those acts of political *management* or political *campaigning* which were prohibited * * *" (emphasis supplied).

Thus, the district court's concern that the prohibition of Section 9(a) might be applied against expression of views on such issues as "China, crime in the streets, inflation, foreign aid, national debt" (J.S. App. 9a), because "[i]n the end everything may appear political * * *" (*id.* at 10a), overlooks the fact that it is not political expression that is regulated by the Hatch Act, only "political management or political campaigning."[1] The central content and meaning of that concept is clear—as applied to any particular activity, the inquiry is necessarily directed not to whether the activity was, in the broad sense, "political," but whether it was undertaken as part of a partisan election campaign or in connection with the management of a political party.

The essential clarity of the political management and campaigning restriction is evident when one considers the kinds of activities in which the individual plaintiffs in this litigation wish to engage. For example, plaintiff Pinho "desires to become a precinct Democratic Committee Woman"; plaintiff Mandicino

[1] This same confusion is manifested in the testimony of Roger Jones quoted in the appellees' brief (p. 51). Of course, the postal worker may express his opinion on government programs to the housewife. If he thinks he cannot, it is hard to see why this mistake should be attributed to the Hatch Act or affect its validity.

engaged in "house-to-house campaigning for candidates of political parties"; plaintiff Wylie "actively * * * campaign[ed] as the Republican nominee for State Senator"; plaintiff Gee wishes to run for Borough Councilman; plaintiff Myers "desires to run as a Republican candidate in the 1971 partisan election for Mayor of West Lafayette, Indiana" (App. 8-10). There is not the least vagueness or uncertainty about the Act's prohibition of each of these activities, or of others that the individual plaintiffs indicate they wish to engage in.[2]

Appellees pitch their vagueness argument in large part on the uncertainty they perceive as to exactly what Congress intended to incorporate into the definition of prohibited campaigning and management in Section 15 (Br. 23). Admittedly, the precise source of the incorporated concept is uncertain, but the point has been belabored far beyond its significance to the constitutional inquiry in this case, since, under any reasonable view of what Congress incorporated (*i.e.*, any view except that all pre-1940 decisions were incorporated regardless of their consistency with the terms of the Hatch Act itself), the prohibition is the

[2] The only activity mentioned by any individual plaintiff about which there could be any element of doubt is plaintiff Hummel's desire to engage in "public endorsement of candidates of a political party for local, state, and national office" (App. 8). The main difficulty in evaluating this proposed activity is the vagueness with which it is described in the complaint. Mr. Hummel is, by the express terms of the Hatch Act, free to express publicly his support for any candidates. The only difficulty would arise if he does so in the context of, and as part of, an organized campaign—*e.g.*, by a speech at a voter rally or by making the endorsement in a campaign brochure.

same except in the most insignificant details and is clear enough to withstand the vagueness attack.

The Commission has been enforcing "voluntary" political activity restrictions for 66 years. During that time it has continuously proscribed certain basic activities constituting political management and campaigning, and it is these activities which are at the heart of the Hatch Act's prohibition. For example:

1. In 1939, the Commission prohibited service as a delegate, alternate, or proxy in any political convention (App. 96).

The same prohibition appeared on Senator Hatch's card (86 Cong. Rec. 2943).

In 1942, the same prohibition was found on page 23 of Form 1236.

In 1944, the same prohibition was found on page 9 of Form 1236.

In 1966, the same prohibition was found in the Commission's Pamphlet 20 (App. 22).

Today, the same prohibition is found in the Commission's regulations (5 C.F.R. 733.122(b)(11)).

2. In 1939, the Commission prohibited service on or for any political committee (App. 97).

The same prohibition appeared on Senator Hatch's card (86 Cong. Rec. 2943).

In 1942, the same prohibition was found on page 23 of Form 1236.

In 1944, the same prohibition was found on page 10 of Form 1236.

In 1966, the same prohibition was found in the Commission's Pamphlet 20 (App. 22).

Today the same prohibition is found in the Commission's regulations (5 C.F.R. 733.122(b)(1)).

3. In 1939, the Commission prohibited the solicitation of political contributions by employees (App. 98).

The same prohibition appeared on Senator Hatch's card (86 Cong. Rec. 2943).

In 1942, the same prohibition was found on page 25 of Form 1236.

In 1944, the same prohibition was found on page 11 of Form 1236.

In 1966, the same prohibition was found in the Commission's Pamphlet 20 (App. 24).

Today, the same prohibition is found in the Commission's regulations (5 C.F.R. 733.122(b)(3)).

4. In 1939, the Commission prohibited employees from acting as watchers, challengers or checkers at the polls (App. 98).

The same prohibition appeared on Senator Hatch's card (86 Cong. Rec. 2943).

In 1942, the same prohibition was found on page 26 of Form 1236.

In 1944, the same prohibition was found on page 13 of Form 1236.

In 1966, the same prohibition was found in the Commission's Pamphlet 20 (App. 26).

Today, the same prohibition is found in the Commission's regulations (5 C.F.R. 733.122(b)(8)).

5. In 1939, the Commission prohibited candidacy for public office (App. 100).

The same prohibition appeared on Senator Hatch's card (86 Cong. Rec. 2943).

In 1942, the same prohibition was found on page 28 of Form 1236.

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In 1944, the same prohibition was found on page 14 of Form 1236.

In 1966, the same prohibition was found in the Commission's Pamphlet 20 (App. 27).

Today, the same prohibition is found in the Commission's regulations (5 C.F.R. 733.122(b)(6)).

Appellees' efforts to denigrate the Commission's regulations on the ground that they came 30 years after enactment of the Hatch Act and to dismiss the interpretation of Section 15 offered in the government's brief in this Court on the ground that it is a "contrary litigation posture" (Br. 25) evaporates in the face of the evidence that the Commission has consistently interpreted the Hatch Act's prohibition to incorporate the same specific types of conduct that were considered impermissible political management or campaigning at the time Section 15 was enacted, except insofar as Section 9's authorization of public expression of opinion on political subjects and candidates and Section 18's exclusion of activities in non-partisan elections curtailed that concept. (The Commission has never considered pre-1940 determinations inconsistent with Section 9 or Section 18 to be among those referred to in Section 15, for purposes of the Act's prohibition, as having been in effect on July 19, 1940, and we urge the Court to construe the statute consistently with this reasonable and long-standing Commission view.) Certainly appellees have failed to point to a single instance in which the Commission has applied a pre-1940 decision in a disciplinary proceeding despite a conflict with Section 9 or Section 18.

Notwithstanding the clear and consistent position of the Commission in this regard, appellees continue to insist that Section 15 incorporated all pre-1940 decisions (Br. 23–31). In effect, they would read Section 15 as though it said "* * * the phrase 'an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission *including determinations inconsistent with the provisions of this Act.*" The Commission reads the provision exactly to the contrary, as though the hypothetical italicized language read "but not including determinations inconsistent with the provisions of this Act." We submit that the latter is the only rational reading of the incorporation provision.[8]

Despite their strenuous efforts, appellees have been able to identify only one area (Br. 41–47) where there is any significant uncertainty about the precise contours of the management and campaigning prohibition—delineation of the point at which protected expression

[8] This interpretation of the statute also disposes of the appellees' suggestion that the Act prohibits such activities as betting on elections, campaigning on the liquor question, or circulating petitions to state, county, or municipal governments (Br. 58). While these were apparently prohibited under old Rule I, and the wagering prohibition appeared on Senator Hatch's card, they were excluded from the political campaigning and management prohibition of the Hatch Act by other provisions of the Act, and no employee has ever been subjected to disciplinary proceedings because of any violation of this sort.

on political subjects and candidates merges into prohibited campaigning.[4] We recognized in our opening brief that this is a difficult area in which borderline cases can arise (p. 48). Indeed, this particular difficulty was recognized at the time of the passage of Section 9 in 1939, as evidenced in a letter from Chairman Mitchell of the Commission to Senator Hatch discussing the content of the prohibition of Civil Service Rule I as adopted by the Hatch Act:[5]

> As you point out, the civil service rules confine classified employees to a *private* expression of opinion, whereas the word "privately" has been omitted from Section 9 of S. 1871. It is believed, however, that even under S. 1871 an expression of opinion which so far exceeds the limits of a private expression of opinion and assumes the aspect of a campaign speech or a canvass for votes, would be in violation of the general prohibition against taking an active part in political management or in political campaigns.

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[4] The only other area of potential uncertainty alluded to in the brief concerns financial contributions (Br. 41). However, the rule here is clear. The making of a voluntary financial contribution of whatever size, while it may violate other laws regulating campaign spending, can never by itself violate the Hatch Act because, standing alone, it is neither management nor campaigning. Of course, "[g]iven proper circumstances and publicity" (Appellees' Br. 41)—*i.e.*, if publicized as part of a candidate's campaign—it could be a prohibited activity. But the prohibition would arise not from the mere fact of the contribution, but from its being publicized by the employee in a campaigning context.

[5] This exchange of correspondence, which is set forth in an appendix to this brief, *infra*, pp. 31–35, took place prior to the enactment of Section 15.

The portion of the Commission's regulations most directly addressed to this area is Section 733.122(b)(7), which describes as a prohibited activity "[s]oliciting votes in support of or in opposition to a partisan candidate for public office or political party office." The precise interface of this prohibition with the recognition in Section 733.111(a)(2) of each employee's right to "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates" is perhaps not as clear in some details as it could be, and the Commission is presently attempting to draft clarifying amendments to the regulations.[6]

However, the important point, glossed over by appellees, is that this is only one aspect of the Hatch Act's management and campaigning prohibition, which

[6] It is the Commission's position, reflected in its enforcement policies, that the employee is free to urge others to vote for a candidate in ordinary conversation, in personal letters to acquaintances, or in letters to the editor of a newspaper or other publication. The phrase "soliciting votes" was intended to refer to more formal and organized campaigning activities, such as telephone or door-to-door canvassing or endorsements in flyers or brochures given wide circulation to prospective voters.

Moreover, any imprecision in Section 733.122(b)(7) is largely dissipated by Section 733.122(b)(10) of the regulations, which makes it clear that expressions of opinion endorsing or opposing partisan candidates are prohibited only if done "in a political advertisement, a broadcast, campaign literature, or similar material." Thus, the questions asked at page 42 of appellees' brief about the kinds of opinions that may be expressed are readily and clearly answerable. The expression of opinion may indeed include "the final, explicit exhortation to vote for, or against, that candidate" so long as the medium of expression is not a campaign instrumentality as specified above.

also encompasses a number of other restrictions that are both important to the accomplishment of the congressional objective and clear. It would be most improper to invalidate the entire management and campaigning prohibition solely because there is some possibility of uncertainty in one facet of its application, particularly in view of the congressionally expressed desire to preserve valid applications of the legislation in the event particular applications are found invalid (see our opening brief at 59).

Finally, appellees seek to substantiate their vagueness argument by an assertion that most federal employees do not in fact correctly understand the prohibitions of the Act, basing this assertion upon a study conducted for the Commission on Political Activity (Br. 47–49). Whatever this survey may demonstrate regarding the knowledge and understanding of the typical federal employee, it is wholly immaterial to the constitutional inquiry in this case. In the first place, there is no indication that the employees surveyed had ever looked at the statute, regulations, or publications of the Civil Service Commission, or that they were encouraged or afforded an opportunity to do so at the time their response to the survey was solicited. The vagueness or precision of the statute and interpretive regulations is thus wholly irrelevant to the accuracy of their responses or their understanding of the prohibition. Surely the question that is pertinent to a vagueness inquiry is not whether people who have never examined the sources of the prohibition have some instinctive or God-given knowledge, but whether individuals can with reasonable facility in-

form themselves of the principles that regulate their conduct.

The questions asked in the survey in fact deal with subjects about which there is no vagueness or uncertainty. The following table appears in the Commission's report, listing the questions and the responses (1 CPA Report 20):

TABLE I.—PERCENTAGE RESPONSES OF FEDERAL EMPLOYEES AS TO WHAT POLITICAL ACTIVITIES THEY THINK THEY "CAN" AND "CANNOT" DO UNDER PRESENT HATCH ACT RULES

Activity	Can	Cannot	Not sure
(a) Make a speech at a rally held by a political party (prohibited)	15.8	69.4	14.6
(b) Put a political sticker on his own car (permitted)	63.0	24.4	12.5
(c) Hold office in a political party organization (prohibited)	8.5	80.6	10.7
(d) Run for state or national political office (prohibited)	8.9	81.0	9.6
(e) Write a letter to his senator or his congressman (permitted)	96.0	1.5	2.2
(f) Drive people to the polls on election day (prohibited)	45.0	40.5	14.2
(g) Run for a school board position where people are not candidates of either major political party (permitted)	66.5	15.8	17.3
(h) Become actively involved in local issues such as civil rights and taxes (permitted)	49.5	32.6	17.3
(i) Participate in voter registration drives (prohibited)	48.1	35.6	16.0
(j) Distribute campaign materials for a party or candidate (prohibited)	18.6	71.2	10.1

[1] Words in parentheses added for this report. Respondents were not asked if activity was prohibited or permitted.

Except for questions (e) and (h), which have nothing to do with political management or campaigning and are thus unrelated to the Hatch Act, and question (i) (see note 7, *infra*), every question is clearly answered by a specific provision of the Civil Service Commission's regulations, so that any employee with the least doubt as to the permissible scope of such activities can readily find a clear answer.[7] Thus the survey, if

[7] Questions (f) and (i) are formulated too ambiguously for a simple, accurate response. As the regulations make clear, driving voters to the polls is prohibited only if done "on behalf of a political party or partisan candidate" (Section 733.122(b)

it establishes anything of relevance to this case, merely shows that the most common questions about permissible and prohibited management and campaigning activities are readily and clearly answerable by recourse to the Commission's interpretive regulations and other publications.

II. THE CONTENTION THAT THE DEFICIENCIES OF THE HATCH ACT, IF ANY, CAN NOT BE CURED BY REFERENCE TO THE COMMISSION'S REGULATIONS OR BY JUDICIAL CONSTRUCTION IS IN ERROR

One of appellees' principal arguments is that the administrative construction of the Act's ban on political management and campaigning should not be considered in evaluating its constitutionality. The contention is accompanied by the further suggestion that no judicial construction of the statute to meet constitutional objections is appropriate (Br. 34–37).

A. THE FACT THAT THIS CASE TOUCHES UPON FIRST AMENDMENT INTERESTS DOES NOT PRECLUDE ADMINISTRATIVE AND JUDICIAL CONSTRUCTION OF THE STATUTE

Appellees suggest that it is inappropriate for the Court to evaluate the statute in light of the Commission's regulations because an imprecisely drawn statute "in the First Amendment area cannot be remedied by a regulation promulgated by an administrative agency" (Br. 34–35). No authority is cited in support of this proposition. Appellees' suggestion is plainly wrong, for it is in the First Amendment area

(9)). The same principle would apply to voter registration drives, which is the one activity covered in the questionnaire but not in the regulations. Voter registration activity is permitted except if undertaken on behalf of a party or candidate.

that this Court has most frequently acknowledged its "obligation * * * to take care to interpret [legislative enactments] so as to avoid a danger of unconstitutionality." *United States* v. *C.I.O.*, 335 U.S. 106, 120–121.[8]

B. IN ATTACKING THE ADMINISTRATIVE CONSTRUCTION, APPELLEES OVERLOOK THE FACT THAT THE CONTROLLING CONSTRUCTION OF THE ACT IS SUPPLIED BY THE COURT

Even if there were some support for the general proposition that statutory vagueness or overbreadth cannot be cured by administrative interpretation, the ultimate question, once a case is *sub judice*, is the appropriateness of a saving judicial construction. (We do not, however, as appellees suggest, concede the facial invalidity of the statute standing alone. The core meaning of "political management and political campaigning" is sufficiently clear that uncertainties about particular peripheral applications do not provide a justification for invalidation of the entire prohibition in all its applications. But the question of the validity of the statute merely on its face is

[8] In *United States* v. *C.I.O.*, this Court gave a narrowing construction to a provision in the Corrupt Practices Act, thereby removing "the gravest doubt * * * as to its constitutionality." 335 U.S. at 121. For other First Amendment cases in which the Court has avowedly sought to "save" a statute by construing it in a narrow manner, see, *e.g.*, *Scales* v. *United States*, 367 U.S. 203 (affirming a conviction for violation of the membership clause of the Smith Act, 18 U.S.C. 2385, after construing the membership clause to reach only "active" members); *United States* v. *Rumely*, 345 U.S. 41, 46 (construing the phrase "lobbying activities" in such a way as to avoid "doubts of constitutionality in view of the prohibition of the First Amendment").

no longer the issue once an authoritative administrative interpretation is available or if the Court engages in its traditional function of statutory construction.)

Ultimately, there is no meaningful analytic distinction between a court's action in itself formulating a narrowing construction and the court's adoption of a narrowing construction previously formulated by the agency responsible for the Act's administration. Obviously, the court is the final arbiter in both cases, deciding in each whether the statutory language is susceptible of clarification and whether the proposed interpretation fairly comports with the ascertainable legislative purpose. Moreover, this Court has recognized that in determining whether a putatively vague or overbroad statute can be clarified or delimited through a narrowing construction, the view of the agency charged with the statute's enforcement is at least entitled to "respectful consideration." *Law Students Research Council* v. *Wadmond*, 401 U.S. 154, 162–163.[9]

[9] Appellees find *Wadmond* inapposite because "unlike the Civil Service Commission here, [the agency there] had been explicitly entrusted with the power to make a definitive interpretation" (Br. 34, n. 20). But the principle of "respectful consideration" by the judiciary of an agency interpretation of a statute that the agency is charged with enforcing has never been limited to those situations where the agency has been delegated formal rulemaking power. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–434; *United States* v. *City of Chicago*, 400 U.S. 8, 10. And, of course, there is no reason why the principle should be so limited where the claims involved are constitutional rather than statutory. Cf. *Zemel* v. *Rusk*, 381 U.S. 1, 11.

C. THIS CASE DOES NOT PRESENT THE TRADITIONAL GROUNDS FOR REFUSING TO SUPPLY A SAVING JUDICIAL CONSTRUCTION

This Court has indicated that the obligation to seek a "saving" construction of a statute rests upon the assumption that Congress "did not want to pass any legislation" that "threatened abridgment of the freedoms of the First Amendment." *United States* v. *C.I.O.*, 335 U.S. 106, 120. Thus, the principle that the Court should seek to "save" the statute by narrowly interpreting it is part and parcel of the more fundamental requirement that the Court should endeavor to give effect to congressional intent. Cf. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10.

In view of the basis upon which the principle rests, it is not surprising that this Court has announced only two exceptions to its general applicability, neither of which is applicable here. First, the Court has made it clear that it "lack[s] jurisdiction authoritatively to construe state legislation." *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369. See also *Gooding* v. *Wilson*, 405 U.S. 518, 520. Thus, while the Court is bound to adopt a state court's narrowing construction (see, *e.g.*, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571), it will not undertake to "supply the requisite construction" itself. *Gooding* v. *Wilson*, *supra*, 405 U.S. at 520. This difference in the Court's role was aptly summarized in *Dennis* v. *United States*, 341 U.S. 494, 501–502:

> * * * [W]e must bear in mind that it is the duty of the federal courts to interpret federal leg-

> islation in a manner not inconsistent with the demands of the Constitution. *American Communications Assn.* v. *Douds,* 339 U.S. 382, 407 (1950). We are not here confronted with cases * * * where a state court had given a meaning to a state statute which was inconsistent with the Federal Constitution. This is a federal statute which we must interpret as well as judge. Herein lies the fallacy of reliance upon the manner in which this Court has treated judgments of state courts. Where the statute as construed by the state court transgressed the First Amendment, we could not but invalidate the judgments of conviction.

The second exception arises in those cases in which a narrowing construction would substantially alter or conflict with the legislative directive embodied in the statute under attack. Thus, the Court has indicated that it will not seek a "saving" construction of a federal statute where "[t]he clarity and preciseness of the provision in question make it impossible to narrow [it] * * * without substantial rewriting." *Aptheker* v. *Secretary of State,* 378 U.S. 500, 515. See also *United States* v. *Robel,* 389 U.S. 258, 262.

This case presents no such problem. Under almost any view of the constitutional issues presented by the Hatch Act's ban on partisan political management or campaigning, a statutory construction is possible that will eliminate any valid constitutional objections without significantly rewriting or in any way subverting the basic congressional directive.[10] Moreover, as

[10] Should the Court agree with the position of the Coalition of American Public Employees *et al.* (Amici Br. 42) that any restrictions on off-the-job political activities is overboard, however, we would agree that there would be no point in striving

pointed out in our opening brief (p. 59), the Court should be particularly disposed to adopting a "saving" construction, if it deems one necessary, in view of the congressional directive that valid portions of the legislation be preserved.

D. THE COURT SHOULD NOT INVALIDATE THE HATCH ACT BECAUSE OF ANY SUPPOSED ABSENCE OF CONGRESSIONAL JUDGMENT THAT THE PROHIBITION IS NECESSARY TO ACCOMPLISH THE ACT'S OBJECTIVES

Perhaps in awareness that this case does not fit into any category of constitutional adjudications in which the Court will decline to seek a "saving" construction, appellees advance a novel and unprecedented theory of inadequacy of congressional deliberations, in order to support the action of the district court. The basic

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for a saving construction, since no meaningful portion of the basic congressional decision could then be preserved. Contrary to this contention of overbreadth, however, Congress obviously determined that the federal employee's official and unofficial activities are, for the Act's purposes, so interrelated that in light of the interests at stake it is not feasible to make a distinction for regulatory purposes between "political activities engaged in by an employee in his capacity as a citizen and those done in his capacity as a government servant * * *" (Amici Br. 42). Moreover, the Hatch Act is not, as the amici apparently assume, limited in its purpose to assuring the impartial discharge of official duties. As summarized in our opening brief (pp. 9–11), at least two of the important objectives of the Act—protection of the integrity of the political process and protection of individual employees from coercive influence—are unrelated to that limited purpose. Thus, sole reliance upon the kind of legislative enactments recommended by the amici would not make it "exceedingly more difficult" (*McGowan* v. *Maryland*, 366 U. S. 420, 451) to achieve the congressional aims; it would make the achievement of those objectives impossible.

thrust of this assertion is that since the Hatch Act touches First Amendment interests, it must be supported by a legislative judgment that it is required by overriding governmental interests (Br. 35). Furthermore, this judgment, according to appellees, "cannot be inferred from the mere fact that the Congress passed the Act" (Br. 61). Appellees therefore review the legislative history (Br. 53–58) in search of an explanation of the prohibition or assertion of its necessity adequate to satisfy their view of the 1973 standards of constitutional analysis. Finding none that satisfies them, they conclude that the statute must fall for lack of adequate congressional findings, and that the Court would be intruding in the congressional domain if it construed the statute to sustain its constitutionality.

This analysis is erroneous both in the legal premise that the constitutionality of the statute turns in this way upon its legislative history and in the historical premise that Congress passed the Hatch Act without understanding what it was doing or giving due consideration to First Amendment concerns. Appellees err in suggesting that courts may infer nothing from the fact that the statute was enacted, but must instead search the published legislative history in order to establish that Congress believed that what it was doing was necessary. Certainly Article I of the Constitution, which specifies the affirmative requirements for valid exercise of the legislative power, does not require Congress to deliberate in a particular manner, or to articulate fully or in any particular way the basis for its legislative judgments.

Nor is there anything in the First Amendment, or in this Court's decisions, from which such a novel requirement can reasonably be inferred.

Certainly the cases cited by appellees fail to establish this proposition. In *Cantwell* v. *Connecticut,* 310 U.S. 296, 307, the Court was reviewing a conviction of a non-statutory, common law offense. In referring to a "statute evincing a legislative judgment" the Court was obviously alluding to the absence of any statute, and therefore of any legislative judgment. There is no suggestion that, given a statute proscribing certain conduct, the Court would have considered the adequacy of the thought processes of the legislators in enacting the statute. Similarly, *Green* v. *McElroy,* 360 U.S. 474, a procedural due process case, specifically turned upon the fact that the programs and procedures for denying security clearances without a hearing were not "the creature of statute or of an Executive Order issued by the President" (*id.* at 495). The Court's reluctance to deprive individuals of traditional rights of confrontation and cross-examination in the absence of an express congressional declaration establishing such procedures in no way supports appellees' proposition. Nor does anything in *Grayned* v. *City of Rockford,* 408 U.S. 104, suggest that the legislative judgment must be evidenced by anything other than the enactment itself—the Court's opinion in *Grayned* did not look behind the provisions of the ordinance itself for a supporting rationale.

The unsoundness of looking into underlying congressional motivations and judgments for purposes of

an inquiry into constitutional validity was explained by the Court in *United States* v. *O'Brien,* 391 U.S. 367, 383–384, which involved a somewhat different, but analogous, contention:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. * * * We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

Moreover, it is clear here that Congress did make the kind of legislative judgment that appellees contend must be made before legislation affecting First Amendment rights can be either narrowly construed or validated. In the first place, it can hardly be gainsaid that Congress knew that it was prohibiting public employees from engaging in political management and campaigning. Nor can it be disputed that Congress had before it a substantial amount of material setting forth at least some of the problems that the Hatch Act was designed to remedy.[11] When, there-

[11] See the discussion entitled "The Enactment of the Hatch Act," at pp. 15–29 of our opening brief.

fore, Congress not only enacted laws prohibiting specific forms of abuse and coercion, but also banned political management and campaigning, it clearly made the "legislative judgment" that the latter measure was necessary to achieve the goal of an impartial civil service that would not threaten disruption of the political process.[12]

Appellees, however, are unwilling to draw the inference that the circumstances mandate and contend, instead, that Congress failed to consider whether the political activity ban was necessary. Indeed, they state that the failure to do so is understandable because "Congress shared the then prevailing notion of con-

[12] Appellees allege that "[t]he supporters of Section 9(a)'s sweeping restrictive provision did not point out a single abuse that could not be eliminated by the direct prohibitions on misuse of office contained in Sections 1 to 8 and the first sentence of Section 9(a)" (Br. 54). What they ignore, however, is that the prohibitions against coercion and misuse of official authority have applied to all federal employees in the executive branch ever since passage of the Civil Service Act of 1883, 22 Stat. 403 *et seq.* See generally 5 U.S.C. 3301 and 7301. Thus, Civil Service Rule 1, § 1, in its pre-Hatch Act form, provided that "[n]o person *in the executive civil service* shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof" (emphasis added). It was only the political activity ban contained in Civil Service Rule 1 that was limited to "[p]ersons * * * in the competitive classified service." (Rule 1 is set forth at App. 92.) Accordingly, all of those employees who engaged in coercion, intimidation and misuse of official authority during the 1936 and 1938 elections were already subject to the very prohibitions which appellees contend are adequate to preserve an impartial civil service. Congress clearly did not believe that the existing prohibitions, which covered excepted and non-classified employees as well as classified ones, were adequate, since in the face of these prohibitions it enacted the political activity ban.

stitutional law that, when a person entered government employment, he waived any First Amendment rights that the legislature, in its discretion, might previously have determined that government employees should not exercise" (Br. 57). But the Act's legislative history, far from supporting this assertion, shows, on the contrary, that Congress was well aware of the First Amendment implications of the ban on political management and campaigning, and took special care to limit the Act's prohibitions so as to avoid constitutional problems. This is borne out, among other ways, by the fact that Congress modified Rule I to provide that all persons retained the right "to express their opinions on all political subjects" both publicly and privately. See opening brief, pp. 17–18.

Moreover, there were many warnings in the debates by opponents of the political management and campaigning restriction that the law would unduly and unjustifiably curtail the rights of covered employees to participate in the political process.[13] That Congress adopted the prohibition in the face of such contentions amply establishes the conclusion that, in the judgment of Congress, the other provisions were insufficient to accomplish the legislative objective and the management and campaigning restriction was necessary for that purpose.[14]

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[13] See, *e.g.*, 84 Cong. Rec. 9602, 9609, 9622–9623; 86 Cong. Rec. 2427, 2565.

[14] Indeed, the exceptions from the Act's coverage of such persons as employees of the Alaska Railroad residing in municipalities on the line and employees who wish to engage in municipal political activities in the District of Columbia area, which the amici contend (Br. 37–40) show that the Act is

III. AN EVIDENTIARY TRIAL AND EXPERT TESTIMONY ARE NOT NEEDED FOR DECISION OF THE CONSTITUTIONAL ISSUE IN THIS CASE

Appellees seem to suggest (Br. 60–63) that whether the Hatch Act is constitutional is a question to be decided on the basis of an evidentiary record. They contend that because they "proffered evidence that the federal civil service merit system would not be jeopardized by permitting government employees freer exercise of their rights of speech and association" (Br. 61) [15] and the government offered no rebuttal, "[t]he only finding that a court could make, on the record in this case, is that there are feasible and less restrictive alternatives to remedy all the abuses within the target area of Section 9(a)'s second sentence. Hence, the statute must fall" (Br. 63).

While this Court will sometimes canvass the legislative alternatives in a case where it is alleged that a statute is overbroad (see, *e.g.*, *Dunn* v. *Blumstein*,

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under-inclusive and does not serve a compelling interest, are obviously designed to ameliorate the institutional impact of the political activity ban in areas where, but for the exception, a large percentage of the citizenry would be prohibited from engaging in partisan political management or campaigning. The exceptions thus manifest congressional sensitivity to implications of the restrictions being imposed and an effort to "tailor [the] statute" (Amicus Br. 40) for optimum achievement of its objectives without sacrifice of basic political values. Similarly, the exception for teachers (5 U.S.C. 7324) reflects a congressional judgment that the incremental potential for harm introduced by that exception is outweighted by the benefits that would accrue from having "students of the science of politics and government" (H. Rep. No. 2296, 77th Cong., 2d Sess. 2) give their opinions and actively participate in politics. *Ibid.*

[15] Appellees refer specifically to the affidavit and oral testimony of Roger W. Jones (Br. 61).

405 U.S. 330), the Court in such cases has never limited its review to those alternatives or justifications that appear in the evidentiary record. *Id.* at 343–360; *McGowan* v. *Maryland*, 366 U.S. 420, 449–453. The question of constitutionality is a question of law. To the extent there is a factual component, it involves evaluation of "legislative" facts and is not to be decided by a trial judge or a jury.[16]

IV. EVEN UNDER THE MOST STRINGENT STANDARDS OF CONSTITUTIONAL REVIEW, THE COURT SHOULD NOT INVALIDATE THE HATCH ACT

The "appropriateness of [the] governmental objective" in restricting partisan political management and political campaigning was not questioned by the district court (J.S. App. 3a) and does not appear to be seriously challenged by appellees. However, because the regulation touches First Amendment considerations, appellees would impose a heavy burden on the government to justify the means adopted by Congress as being necessary to the furtherance of a compelling governmental interest and to show that no less restrictive alternative is available to accomplish the legislative objectives. We believe the government demonstrably has a compelling interest in maintaining the integrity of the civil service, insulating government employees from pressure to engage in involuntary political activities, and protecting the integrity of the Nation's political processes from the adverse

[16] Surely it would be extraordinary to have the constitutionality of a major Act of Congress turn upon the tactical decision of a trial lawyer for the government not to engage in a "battle of experts" by introducing testimony supporting the legislative judgment.

effects of a mobilization of government employees on behalf of partisan political interests. The only issue of substance is whether the prophylactic approach of the Hatch Act can safely be abandoned without jeopardizing these important objectives, and to what extent this question is to be resolved by Congress rather than by the Court.

We do not believe that the Court should apply the stringent standards of review suggested by appellees to this legislation. Without minimizing the importance of the First Amendment activities that are subject to constraint by the Hatch Act, we think it significant for this purpose that these constraints are, as we have pointed out in our opening brief (pp. 7–11, 60), imposed here in part to foster other important First Amendment values.

Even under the most stringent standard of review, we submit that the Court should not find the Hatch Act prohibitions, reasonably construed, to be unnecessary to the accomplishment of the important governmental objectives at stake. This is not a case in which, as in *Dunn* v. *Blumstein, supra,* the Court's review of the legislation, in the context of the governmental purposes it is intended to serve, leaves it apparent that less restrictive alternatives can be formulated to meet these needs. There is, we readily concede, a body of opinion that the prophylactic provisions of the Hatch Act are not necessary to accomplish its objectives and that restrictions more narrowly directed at coercion and abuse of office will suffice. These were the views of those in Congress who opposed the Hatch Act, and they

are the views of appellees' witness Roger Jones. On the other hand, there is a substantial body of opinion that agrees with Congress' determination that the prophylactic approach is necessary to preserve a truly impartial civil service and to protect the integrity of the political process from coercive influences. Thus, even the Commission on Political Activity of Government Personnel, while it recommended that "the area of political activity permitted to Federal employees * * * [be expanded],"[17] did not call for repeal of all restrictions on partisan political activities.[18]

Some of the reasons for preserving the current approach were forcefully stated by Congressman Nelsen, one of the Commission's 12 members, in his separate statement of views accompanying the Commission's Report:[19]

"But I further believe that experience has shown that much of the protection for the employee against such pressures must come through the restrictions regarding political activity placed on each employee, wherever he may be in the government structure.

"The proposal to open the door to partisan political activity by the career Federal employee within either of the two major political parties of this country, in my judgment, is a first dangerous step toward a return to the political spoils system. There are numerous examples of testimony in the Commission hearings from Federal and State employees recommending that the

[17] CPA Report 3.

[18] See the summary of recommendations as set forth at 1 CPA Report 4–5.

[19] 1 CPA Report, 36–37.

present policy of the Hatch Act in this respect be maintained. If we are unable to adequately police pressures put on the Federal employee at the present time, operating as they are under the nonpartisan restrictions, how can we but believe that the injection of major partisan activities into the structure will make such enforcement virtually impossible? Under our political system I do not believe it is practically possible to deny any partisan candidate the freedom to manage and conduct his campaign in all respects allowed to his opponent, whether those activities go to solicitation of funds or other political action. Also, the local party organization is inextricably connected with the national party organizations. Local leaders almost inevitably play a part in the State and National political affairs. To think that we can confine a person's involvement in partisan politics to certain limits on the local level is wishful thinking.

"The possible benefits to be gained by allowing a desirous few to participate in partisan political candidacy and political management activity, when weighed against the dangers that such activity poses to an impartial, efficient public service and the hundreds of thousands of employees in it, is simply not worth the inherent risk in such action. The benefits of the impartial public service, whether they be of tenure, job assignments, and promotions on merit, or simply freedom from the many insidious types of pressures present in partisan operations, compensates the employee many times over in return for the relatively few restrictions placed on his action. Indeed,

under the present Hatch Act, and surely under a revised act should the Congress see fit to accept many of our recommendations, the Federal employee is and will be allowed far more liberty in political action than is actually taken by all but a very minor percentage of our population as a whole."

It is readily apparent that the question whether the Hatch Act's ban on partisan political activity is necessary to preserve the integrity of the federal civil service, and whether more direct and narrow prohibitions will suffice to prevent coercion of government employees, is one on which opinions reasonably differ. Congress, in light of its highly relevant practical political experience, made the judgment that the restriction was necessary when it passed the Hatch Act, and, as we have shown, there is ample basis for concluding that the judgment remains a sound one today. In light of the complex nature of the problem, the political judgment required in solving it, and the manifest reasonableness of the congressional solution, we submit that the legislative judgment should be sustained by this Court. As the Court stated in *Communications Assn.* v. *Douds,* 339 U.S. 382, 400–401:

> This Court must, if such regulation unduly infringes personal freedoms, declare the statute invalid under the First Amendment's command that the opportunities for free public discussion be maintained. But insofar as the problem is one of drawing inferences concerning the need for regulation of particular forms of conduct from conflicting evidence, this Court is in no position to substitute its judgment as to the

necessity or desirability of the statute for that of Congress. * * *

Congress, if it sees fit to do so, could of course experiment with a materially less restrictive approach, in the hope that it would not give rise to the adverse consequences feared or, at least, that the magnitude of those adverse consequences would be outweighed by the benefits of allowing government employees greater freedom of political activity. If such an experiment proved unsuccessful—if it proved a threat to the integrity of the political processes or of the public service—then Congress could take appropriate corrective action. But the needed flexibility to attempt to provide maximum protection for all the First Amendment interests involved in this complex area would be lost if this Court were to hold that the Constitution will permit only one particular solution. The Court should leave Congress some room to move around, some room in which to exercise its grant of legislative power.

CONCLUSION

For the foregoing reasons, as well as the rea
stated in our opening brief, the judgment of the
trict court should be reversed and the compl
should be ordered dismissed.

Respectfully submitted.

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MARCH 1973.

APPENDIX

U.S. SENATE,
COMMITTEE ON AGRICULTURE AND FORESTRY,
July 26, 1939.

Hon. HARRY B. MITCHELL,
President, United States Civil Service Commission,
Washington, D.C.

MY DEAR MR. MITCHELL: Senate Bill 1871, which has passed both branches of the Congress and now awaits Presidential action, contains one section which is practically identical with Rule I of the Civil Service relating to political activity. I enclose a copy of the bill as it passed the Congress and direct your particular attention to Section 9 thereof. With the exception of the word "privately" which is eliminated, you will observe the principal parts of this section follow the language of the Civil Service Rule I. In drafting this section, I adopted this rule, hoping that we could have the same rule applicable to all employees of the Federal government. I am constantly called upon for interpretations of the meaning of political activity as used in this section. I want them to have and think the words should have the same interpretation under this bill which the Civil Service gives to the words appearing in Rule I, hence this letter.

I shall briefly enumerate some of the things which I think are included in the bill and some which are not, and would like to have your opinion on my interpretation, especially whether the Commission has differently interpreted the Civil Service rule. Under my construction of this language, among other things, the following would be prohibited:

1. The holding of office in political party organizations;

2. Attending caucuses or conventions as delegates thereto;

3. Holding office or other activity in political conventions or caucuses;

4. Soliciting campaign contributions;

5. Making political speeches or soliciting votes or support in behalf of candidates or parties in primary or general elections;

6. Becoming a candidate for office or nomination in primary, convention or general elections;

7. Membership in organizations formed merely for partisan political purposes.

The following would not be prohibited and employees would be permitted to:

1. Make voluntary contributions to political parties;

2. To freely express political opinions on all subjects;

3. To attend any political meeting as a spectator (perhaps even sit on the platform. ?)

4. To attend social functions even though political speeches might be made and proceeds from the sale of dinner tickets are to be used for political purposes, such as Jackson Day dinners, etc., provided of course attendance at such functions was purely voluntary.

Will you please, at your earliest possible convenience give me your views on these matters in writing. For many reasons, it is necessary that I have your construction as quickly as possible. Any suggestions along this general line as to what would or would not be included in the term, "political activity", would be appreciated.

Your very truly,

CARL A. HATCH.

JULY 28, 1939.

Hon. CARL A. HATCH,
U.S. Senate.

DEAR SENATOR HATCH: I am pleased to acknowledge receipt of your letter of July 26, 1939, regarding the interpretation of Senate Bill 1871, "To Prevent Pernicious Political Activities", which has passed both branches of Congress and is now awaiting action by the President.

Section 9 of the enactment reads substantially the same as Section 1 of Civil Service Rule I, and your interpretation of Section 9 appears to be the same as the interpretation which the Commission has placed on Civil Service Rule I. I am enclosing a copy of a pamphlet published by the Commission giving detailed information regarding the civil service rules, Executive orders, and statutes concerning political activity and political assessments of Federal officeholders and employees, and am indicating below for your convenience the page and section of this pamphlet in which the particular types of political activity are discussed.

Section 1 of Civil Service Rule I is interpreted to prohibit the following types of political activities on the part of employees in the classified civil service:

1. The holding of office in political party organizations. (Page 4, sections 14 and 15).

2. Attendance at caucuses or conventions as delegates. (Page 4, section 12).

3. Holding office or other activity at political conventions or caucuses. (Page 4, section 13).

4. Soliciting campaign contributions. (Page 5, section 16). The solicitation of political contributions by any person who is in the service of the United States or who is receiving compensation for services from money derived from the Treasury of the United States, regardless of whether

such person is in the classified civil service or not, from any other such officer or person is a violation of Section 118 of the Criminal Code. (Page 17, section 39, et. seq.)

5. Making political speeches or soliciting votes or support in behalf of candidates or parties in primaries or general elections. (Page 5, sections 18 and 19).

6. Becoming a candidate for office or nomination in primary conventions or general elections.

Such activity on the part of a classified employee is prohibited under Section 1 of Civil Service Rule I, except in such cases where special permission has been extended by Executive order, such as in the case of employees residing in municipalities adjacent to the District of Columbia and in the case of employees at navy yards or arsenals and military establishments of the War Department. (Page 7, section 29; pages 12 and 13).

Section 1 of Civil Service Rule I has been construed to permit classified employees to engage in the following types of activity:

1. Membership in clubs or organizations formed for purely partisan political purposes (page 4, sections 15 and 14), provided the employee is not an active member, an officer, or a member of any committee.

2. The making of a voluntary contribution to political parties. (Page 5, section 16). It is a violation of Section 121 of the Criminal Code, however, for an employee to make such a contribution to another Government employee, regardless of whether or not either employee is in the classified civil service. (Page 19, section 46).

3. The private expression of political opinions. (Page 5, section 18).

As you point out, the civil service rules confine classified employees to a *private* expression of opinion, whereas the word "privately" has been omitted from Section 9 of S. 1871. It is believed, however, that even under S. 1871 an expression of opinion which so far exceeds the limits of a private expression of opinion and assumes the aspect of a campaign speech or a canvass for votes, would be in violation of the general prohibition against taking an active part in political management or in political campaigns.

4. Attendance at political meetings as a spectator. (Page 5, section 17; page 4, sections 12 and 13).

5. Attendance at social functions where political speeches may be made and the proceeds from the sale of dinner tickets may be used for political purposes, such as at Jackson Day dinners.

The Commission construes attendance at such functions as in the same light as attendance at political meetings, and a classified employee may therefore attend such functions as an inactive participant. Although the contributions made at such functions purport to be the purchase price of the dinner tickets, they are in actuality political contributions and must not be made or solicited in violation of the statutes which I have already mentioned prohibiting the solicitation or receipt of political contributions between Federal employees.

I trust the information herein will serve your purposes. If there is any further way in which I can be of assistance I shall be happy to do so.

Sincerely yours,

HARRY B. MITCHELL,
President.

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